

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

BRISTOL, ss

15-P-0256

2015 SITTING

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COMMONWEALTH

v.

JEMAUL OLIVEIRA

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ON APPEAL FROM A JUDGMENT OF  
THE NEW BEDFORD DISTRICT COURT

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COMMONWEALTH'S BRIEF  
AND RECORD APPENDIX

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### **ISSUE PRESENTED**

Defendant arrived at a department store in a car that was driven by co-defendant and registered to co-defendant's girlfriend. At the store, defendants were caught shoplifting and were arrested. The police did not know whether the registered owner of the car was available to promptly take possession of the car and the department store manager asked the police to remove it from the premises. The police did remove it, impounded it, and found a gun in the glove compartment in the course of the inventory search. Did the motion judge incorrectly suppress the firearm on the ground that the decision to impound the car was unreasonable, where the police had no obligation to contact the girlfriend and the store manager did not want the car to remain in the store lot overnight?

### **STATEMENT OF THE CASE<sup>1</sup>**

On March 19, 2013, complaint 1333CR1572 issued in New Bedford District Court, charging defendant, Jemaul Oliveira, with shoplifting by concealing merchandise, G.L. c. 266 §30A, carrying a firearm without a FID

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<sup>1</sup> References to the Record Appendix are cited as [RA. pg].

card, G.L. c. 269 §10(h), and carrying a firearm without license, G.L. c. 269 §10(a). [RA.1]

On the same day, complaint 1333CR1576 issued in New Bedford District Court, charging co-defendant, Mitchell Violet, with shoplifting by concealing merchandise, G.L. c. 266 §30A, and carrying a firearm without a license G.L. c. 269 §10(a). [RA.47]

Defendants moved to suppress the firearm seized from the glove compartment of the vehicle that Violet had operated. [RA.7-8,12-21] Defendants' motions were joined and hearing on the motion (J. Hand) was held on November 1, 2013. [RA.7-8] On November 20, 2013, an order granting the motion was entered. [RA.7-8]

On November 27, 2013, the Commonwealth filed its Notice of Appeal and a Motion to Enlarge Time to Apply for Leave to Proceed with Interlocutory Appeal. [RA.8,27-30] The Commonwealth's Motion to Enlarge was allowed (J. Sabra).<sup>2</sup> [RA.8,27-30]

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<sup>2</sup> Complaints 1333CR1791 and 1333CR1792 issued in New Bedford District Court on March 20, 2013 charging Oliveira and Violet, respectively, with carrying a loaded firearm without a license. [RA.46,48] The charges are connected to the same firearm that is the subject of complaints 1333CR1572 and 1333CR1576. The lower court's decision, suppressing the firearm, was entered in all four cases. But the Commonwealth did not file its notices of appeal in the latter cases

The Commonwealth's Application for Leave to Proceed with Interlocutory Appeal was entered with the Supreme Judicial Court on December 30, 2013 and it was allowed on June 11, 2014 (Duffly, J.). [RA.31-45]

On February 26, 2015, this case was docketed with the Appeals Court.

#### **STATEMENT OF THE FACTS**

In allowing the defendant's motion to suppress, the motion judge made the following findings of facts "[b]ased on the credible evince presented at the hearing":

On Monday, March 18, 2013, at approximately 4:30 p.m., Dartmouth police officer Robert St. Denis was dispatched to the Kohl's department store in Dartmouth in response to a request from the Kohl's loss prevention department. St. Denis understood that Kohl's loss prevention agents were holding two men on suspicion of shoplifting.

Arriving at the Kohl's store at approximately the same time as another Dartmouth officer, Morency, St. Denis went to the loss prevention officer where he encountered Mitchell Violet and Jemaul Oliviera, now co-defendants. St. Denis was made aware that Violet and Oliviera had been detained by Kohl's loss prevention officers after the loss prevention officers determined that each of the co-defendants had selected items from the store, paid for some of those items, but left the store without paying for

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[1333CR1791 and 1333CR1792]. Thus, complaints 1333CR1791 and 1333CR1792 are not a part of this appeal.

other of the items that each held. St. Denis told the defendants that the police had been called in response to the shoplifting complaint. He eventually asked the defendants how they had arrived at the Kohl's. Violet told the police that he had driven "his" car; the car was, however, registered to Violet's girlfriend. Morency asked Violet for permission to search the car for a bag of Kohl's merchandise. Violet agreed to allow the police to enter and search the car for the Kohl's merchandise; he provided the police with his car keys. The police went to the car, which was properly parked in a marked parking spot. They used the defendant's key to open it, and found the bag in plain view. The police brought the bag into the store and learned that one of the defendants had a receipt for the merchandise in that bag.

The police arrested the defendants for shoplifting and told the defendants that the car that they had arrived in would be inventoried and towed. The defendants, who had been matter-of-fact and cooperative with the police and loss prevention officers to this point, became visibly agitated. Violet told the police that he wanted his girlfriend, the registered owner of the car, to come and pick the car up; he did not want the car inventoried or towed.

The car was legally parked in a parking space in the Kohl's parking lot, well within business hours. There was no indication that the registered owner of the car was unable or unwilling to come retrieve the car. The police advised the Kohl's manager that the car might remain in the parking lot overnight; on the evidence at the hearing, this prediction was completely speculative, as no one made an effort to find out whether the owner of the car would come get it, and if so, when. The manager did not want the car to remain there and asked the police to remove it. The Dartmouth Police Department's tow policy permits the police to tow a vehicle, among other scenarios, "pursuant to a lawful arrest

when the vehicle would be left unattended." While the tow policy permits the police to forego an inventory "if the vehicle is; [l]egally parked and locked; . . . [and/or] [r]etrieved by a third party," the inventory policy does not require the police to allow an arrestee to contact a third party to arrange for private removal of the vehicle. In this instance, although Violet expressed a desire to have the owner of the car come to retrieve it, the police did not honor that request. Instead, they conducted an inventory search.

The police searched the car, adhering to the inventory policy limits. In searching the unlocked glove compartment, the police found what they believed to be a firearm, loaded and unlocked. Either while this inventory search was going on, or shortly after the inventory search was undertaken, the police pat-frisked the defendants and discovered a bullet in possession of one of them. The police were not aware that the defendants had a bullet in the possession of one or the other of them until after the suspected gun had been found in the car's glove compartment. [RA.16-18]

## **ARGUMENT**

### **THE MOTION JUDGE ERRONEOUSLY CONCLUDED THAT THE DECISION TO IMPOUND THE CAR WAS UNREASONABLE.**

#### **a) Standard of Review**

"In reviewing a ruling on a motion to suppress, [an appellate court] accept[s] the judge's subsidiary findings of fact absent clear error . . . [but] . . . review[s] independently the motion judge's application of constitutional principals to the facts found."

*Commonwealth v. Franklin*, 456 Mass. 818, 820 (2010).



**b) The Decision To Impound The Car Was Reasonable Since The Registered Owner Of The Car Was Not At The Scene To Explain What She Wanted To Do With The Car And The Store Manager Did Not Want The Car To Remain On The Premises Overnight.**

"Under both the Federal and Massachusetts Constitutions, analysis of the legitimacy of an inventory search of an impounded vehicle involves two related, but distinct, inquiries: (1) whether the impoundment of the vehicle leading to the search meets constitutional strictures, and (2) whether the conduct and scope of the search itself meets those strictures." *Commonwealth v. Ellerbe*, 430 Mass. 769, 772-773 (2000).

In this case, the motion judge found that the search was a "'true' inventory search, in that it was intended to secure the [ ] vehicle and its contents as the vehicle was towed and stored; it was not a pretext for an investigatory search." [RA.18]<sup>3</sup>

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<sup>3</sup> "Under both the Federal and State Constitutions inventory searches must be done in accordance with the standard police operating procedures, and under art. 14, those standard procedures must be in writing." *Commonwealth v. Eddington*, 459 Mass. 102, 108 n. 11 (2011), citing *Commonwealth v. Ellerbe*, 430 Mass. 769, 773 n.8 (2000), and case cited. But "the standard written procedure [ ] required for inventory searches focus[es] solely on the conduct of the search of the motor vehicle, not on whether the motor vehicle itself should be impounded and made the subject of an

Accordingly, the judge found that the question at issue was "whether the police acted constitutionally in seizing the [] car without providing the defendants an opportunity to make other reasonable arrangements for the car's removal from the lot: specifically, arranging for the owner of the car to come and get it." [RA.19]

In concluding that the decision to impound the car was unreasonable, and thus unconstitutional, the motion judge reasoned as follows:

In this case, there was nothing about the defendants' behavior or about the items initially found in the consent search of the vehicle that would have given rise to a suspicion that allowing the car to remain in the Kohl's lot until the owner could retrieve it would pose any risk of harm to the public. Violet's request that the car not be towed and that its owner be permitted to come get it was, at that point, reasonable. [RA.20]

But, in concluding that what Violet asked the police to do was reasonable, the motion judge failed

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inventory search." 459 Mass at 112, (Gants, J., concurring), citing *Commonwealth v. Daley*, 423 Mass. 747, 749-751 (1996). In any case, because the judge ruled the search of the motor vehicle to be a "'true' inventory search," and because there is no requirement that there be a standard written procedure for impoundment of automobiles, whether there was a written policy regarding the impoundment is not relevant here.

to consider that the registered owner of the car was not at the scene to indicate what *she* wanted to do with the car, that the police were not required to contact her, and that the store manager did not want the car to remain in the parking lot over night.

If the vehicle's owner is present and proposes an alternative disposition of the vehicle, it is appropriate to consider what the owner proposes. See *Commonwealth v. Carceres*, 413 Mass. 749, 751-752 n.2 (1992). But, if the owner is not at the scene, "the police are *not* constitutionally obligated to contact the owner" of a vehicle before towing pursuant to a lawful inventory policy. *Commonwealth v. Eddington*, 459 Mass. 102, 109-110 (2011) (emphasis added). See also, *Commonwealth v. Henley*, 63 Mass. App. Ct. 1, 6 (2005) (Police had no constitutional obligation to contact, at early morning hour, owner of vehicle, which was rental company, or authorized driver under rental agreement who was not present at stop.) Requiring the police to contact the owner of the vehicle, the Court explained in *Eddington*, would "contravene[] the proper constitutional analysis -- the touchstone of reasonableness that itself

necessitates a case-by-case analysis that takes into account the numerous and varied situations in which decisions to impound are made." *Commonwealth v. Eddington*, 459 Mass. 102, 109 n.12 (2011), citing *Coolidge v. New Hampshire*, 403 U.S. 443, 509-510 (1971).

Further, "[s]eizure is an appropriate course of action when the owner or manager of the parking facility asks that the car be removed," *Commonwealth v. Brinson*, 440 Mass. 609, 613 (2003), citing 3 LaFave, *Search and Seizure* §7.3(c), at 521 (3rd ed. 1996), and sparing the property owner "the burden of dealing with the vehicle" is a valid justification for impounding an automobile parked in a private lot. *Commonwealth v. Dunn*, 34 Mass. App. Ct. 702, 705 (1993), citing 3 LaFave, *Search and Seizure* §7.3(c), at 86-87 (2d ed. 1987).

Here, the store manager requested the car to be removed from the parking lot. [RA.17] ("The manager did not want the car to remain there and asked the police to remove it.") The police were justified in following the store manager's request that they remove the car from the store's premises, especially after its driver

was arrested for stealing from the store. Accord. *United States v. Kelehar*, 470 F.2d 176, 178 (5<sup>th</sup> Cir. 1972) (impoundment justified where manager of Coral Bar-B-Que asked for defendant's car to be removed from premises after defendant was arrested for passing counterfeit money); *Fitzgerald v. State*, 201 Ga. App. 361, 364 (1991) (impoundment of car from K-Mart proper where manager affirmatively requested police to remove the car from parking lot); *State v. Cabage*, 649 S.W. 2d 589 (Tenn. 1983) (impoundment of car proper where manager of car wash requested car to be removed after defendant was arrested for public drunkenness).

The police had advised the store manager that the automobile "might remain in the parking lot over night." [RA.17] (emphasis added) The motion judge found that "on the evidence at hearing, this prediction was completely speculative, as no one made an effort to find out whether the owner of the car would come get it, and if so, when." [RA.17] But, as explained above, the police were not required to contact the owner. Thus, not knowing whether the owner could take prompt possession of the car, it was reasonable for the police to tell the store manager that the car "might"

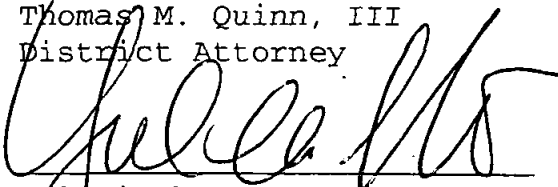
remain in the parking lot over night and, consequently, to comply with the store manager's request to remove the car.

The feasibility of an alternative to impounding the car in this case would have required the police to contact the owner, find out if she could retrieve the car, and, if she could in fact retrieve the car, ask the store manager whether he would permit the car to remain in the parking lot in the meantime. It was reasonable for the police to impound the car and promptly return to police business.

#### **CONCLUSION**

For the foregoing reasons, the Commonwealth respectfully asks this Court to reverse the motion judge's order allowing the defendant's motion.

Respectfully submitted,  
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Date: March 25, 2015

**CERTIFICATION**

As counsel for the Commonwealth, I certify that this brief complies with the rules of the court pertaining to the filing of briefs, including Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R.A.P. 16(e) (references to the record); Mass. R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h) (length of briefs); Mass. R.A.P. 18 (appendix to the briefs); and Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

**COMMONWEALTH OF MASSACHUSETTS**



Yul-mi Cho  
Assistant District Attorney

March 25, 2015

## **Record Appendix**



COMMONWEALTH'S RECORD APPENDIX

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<b>CRIMINAL COMPLAINT</b> ORIGINAL		DOCKET NUMBER 1333CR001572	NO. OF COUNTS 3	<b>Trial Court of Massachusetts District Court Department</b>
DEFENDANT NAME & ADDRESS Jemaul R Oliveira 155 Willis Street New Bedford, MA 02740				COURT NAME & ADDRESS New Bedford District Court 75 North Sixth Street New Bedford, MA 02740 (508)999-9700
DEFENDANT DOB 10/21/1987	COMPLAINT ISSUED 03/19/2013	DATE OF OFFENSE 03/18/2013	ARREST DATE 03/18/2013	
OFFENSE CITY / TOWN Dartmouth		OFFENSE ADDRESS		NEXT EVENT DATE & TIME 03/19/2013 9:00 AM
POLICE DEPARTMENT DARTMOUTH PD		POLICE INCIDENT NUMBER 13-123-AR		NEXT SCHEDULED EVENT Arraignment
OBTN TDAR201300123				ROOM / SESSION Arraignment Session
<p>The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date(s) indicated below the defendant committed the offense(s) listed below and on any attached pages.</p>				

COUNT	CODE	DESCRIPTION
1	266/30A/D	SHOPLIFTING BY CONCEALING MDSE c266 §30A

On 03/18/2013 did intentionally conceal merchandise offered for sale by Kohl's Department Store, a store or other retail mercantile establishment, with the intention of depriving the merchant of the proceeds, use or benefit of such merchandise, or converting the same to the defendant's use without paying the merchant the value thereof, in violation of G.L. c.266, §30A, second par.

PENALTY: not more than \$250.

2	269/10/G	FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h)
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On 03/18/2013 did own, possess or transfer a firearm, rifle, shotgun or ammunition without complying with the requirements relating to the firearm identification card as provided for in G.L. c.140, s.129C, in violation of G.L. c.269, s.10(h)(i)

PENALTY: jail or house of correction for not more than 2 years; or not more than \$500 fine; s.10(e); item to be ordered forfeited.

3	269/10/J	FIREARM, CARRY WITHOUT LICENSE c269 s.10(a)
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On 03/18/2013 did knowingly have in his or her possession, or under his or her control in a vehicle, a firearm, as defined in G.L. c.140, s.121, or a rifle or shotgun, not then being present in his or her residence or place of business, and not having in effect a license to carry firearms or otherwise being authorized by law to do so, in violation of G.L. c.269, s.10(a).

PENALTY: state prison not less than 2 1/2 years not more than 5 years; or jail or house of correction not less than 18 months or not more than 2 1/2 years; no continuance with a finding, filing, or suspended sentence, probation, parole, furlough, or sentence deduction until 18 months served; item to be ordered forfeited.

SIGNATURE OF COMPLAINANT <i>X George Sewy</i>	SWORN TO BEFORE CLERK-MAGISTRATE/ASST. CLERK/DEP. ASST. CLERK <i>X Peter L. Brown</i>		DATE 3/19/13
NAME OF COMPLAINANT	A TRUE COPY ATTEST <i>X</i>	CLERK-MAGISTRATE/ASST. CLERK	DATE

Notice to Defendant: 42 U.S.C. § 3796gg-4(e) requires this notice: If you are convicted of a misdemeanor crime of domestic violence you may be prohibited permanently from purchasing and/or possessing a firearm and/or ammunition pursuant to 18 U.S.C. § 922 (g) (9) and other applicable related Federal, State, or local laws.

<b>CRIMINAL DOCKET</b>		DOCKET NUMBER <b>1333CR001572</b>		NO. OF COUNTS <b>3</b>		Trial Court of Massachusetts District Court Department		
DEFENDANT NAME AND ADDRESS Jemaul R Oliveira 155 Willis Street New Bedford, MA 02740			DOB 10/21/1987		GENDER Male		COURT NAME & ADDRESS New Bedford District Court 75 North Sixth Street New Bedford, MA 02740	
			DATE COMPLAINT ISSUED 03/19/2013					
			PRECOMPLAINT ARREST DATE 03/18/2013		INTERPRETER REQUIRED			
FIRST FIVE OFFENSE COUNTS								
COUNT	CODE	OFFENSE DESCRIPTION					OFFENSE DATE	
1	266/30A/D	SHOPLIFTING BY CONCEALING MDSE c266 §30A					03/18/2013	
2	269/10/G	FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h)					03/18/2013	
3	269/10/J	FIREARM, CARRY WITHOUT LICENSE c269 s.10(a)					03/18/2013	
DEFENSE ATTORNEY <i>Atty J. Magan</i>			OFFENSE CITY/TOWN Dartmouth			POLICE DEPARTMENT DARTMOUTH PD		
DATE & JUDGE		DOCKET ENTRY			DATE & JUDGE		FEES IMPOSED	
<i>Subm 3/19/13</i>		<input checked="" type="checkbox"/> Attorney appointed (SJC R. 3:10) <input type="checkbox"/> Atty denied & Deft. Advised per 211 D §2A <input type="checkbox"/> Waiver of Counsel found after colloquy  Terms of release set: <input type="checkbox"/> PR <input checked="" type="checkbox"/> Bail <input type="checkbox"/> See Docket for special condition <input type="checkbox"/> Held (276 §58A)  <input type="checkbox"/> Potential of bail revocation (276 §58) Arraignment on release: Persons admitted to bail who are charged with an additional crime during the period of release, may have the bail revoked in accordance with the provisions of Mass. General Law Chapter 276, Section 58 <input type="checkbox"/> Waiver of jury found after colloquy <input type="checkbox"/> Does not waive  Advised of trial rights as pro se (Dist. CL Supp.R.4)  Advised of right of appeal to Appeals CL (M.R. Crim P.R. 28)			<i>3/19/13</i>		Counsel Fee (211D § 2A(2)) \$ <i>150</i> <input type="checkbox"/> WAIVED	
							Counsel Contribution (211D § 2) \$ <input type="checkbox"/> WAIVED	
							Default Warrant Fee (276 § 30(1)) \$ <input type="checkbox"/> WAIVED	
							Default Warrant Arrest Fee (276 § 30 (2)) \$ <input type="checkbox"/> WAIVED	
							Probation Supervision Fee (276 § 87A) \$ <input type="checkbox"/> WAIVED	
					Bail Order Forfeited			
SCHEDULING HISTORY								
NO.	SCHEDULED DATE	EVENT	RESULT			JUDGE	TAPE START/STOP	
1	03/19/2013	Arraignment	<input checked="" type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd			<i>Subm</i>		
2	<i>3/25/13</i>	<i>den</i>	<input type="checkbox"/> Held <input checked="" type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd			<i>Goswami</i>		
3	<i>3/21/13</i>	<i>motion</i>	<input type="checkbox"/> Held <input checked="" type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd			<i>Forester</i>	<i>6/1/11.08</i>	
4	<i>4/17/13</i>	<i>pth</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input checked="" type="checkbox"/> Cont'd			<i>Salas</i>		
5	<i>5-13-13</i>	<i>pth</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input checked="" type="checkbox"/> Cont'd			<i>Forester</i>	<i>34/11.09</i>	
6	<i>6/21/13</i>	<i>pth</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd					
7	<i>6-15-13</i>	<i>motion</i>	<input checked="" type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd			<i>Bullock</i>		
8	<i>6/21/13</i>	<i>pth</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input checked="" type="checkbox"/> Cont'd			<i>Conner</i>		
9	<i>9-18-13</i>	<i>pth</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input checked="" type="checkbox"/> Cont'd			<i>Conner</i>		
10	<i>10-11-13</i>	<i>mot</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input checked="" type="checkbox"/> Cont'd			<i>Conner</i>		
APPROVED ABBREVIATIONS								
ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review								
SRP = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWF = Continuance-without-finding scheduled to terminate PRO = Probation scheduled to terminate								
DFTA = Defendant failed to appear & was defaulted WAR = Warrant issued WARD = Default warrant issued WR = Warrant or default warrant recalled PVH = probation revocation hearing.								
A TRUE COPY ATTEST:		CLERK-MAGISTRATE / ASST CLERK <b>X</b>				TOTAL NO. OF PAGES 1		
						ON (DATE)		



<b>CRIMINAL DOCKET - OFFENSES</b>		DEFENDANT NAME <b>Jemaul R Oliveira</b>		DOCKET NUMBER <b>1333CR001572</b>	
COUNT / OFFENSE <b>1 SHOPLIFTING BY CONCEALING MDSE c266 §30A</b>				DISPOSITION DATE AND JUDGE	
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and 278 §29D warning <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)		FINE/ASSESSMENT HEAD INJURY ASMT RESTITUTION V/W ASSESSMENT COSTS		OUI §24D FEE BATTERER'S FEE OTHER OUI VICTIMS ASMT	
FINDING <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause		SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by:			
FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)		JUDGE		DATE	
COUNT / OFFENSE <b>2 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h)</b>				DISPOSITION DATE AND JUDGE	
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and 278 §29D warning <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)		FINE/ASSESSMENT HEAD INJURY ASMT RESTITUTION V/W ASSESSMENT COSTS		OUI §24D FEE BATTERER'S FEE OTHER OUI VICTIMS ASMT	
FINDING <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause		SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by:			
FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)		JUDGE		DATE	
COUNT / OFFENSE <b>3 FIREARM, CARRY WITHOUT LICENSE c269 s.10(a)</b>				DISPOSITION DATE AND JUDGE	
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and 278 §29D warning <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)		FINE/ASSESSMENT HEAD INJURY ASMT RESTITUTION V/W ASSESSMENT COSTS		OUI §24D FEE BATTERER'S FEE OTHER OUI VICTIMS ASMT	
FINDING <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause		SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by:			
FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)		JUDGE		DATE	

Date/Time Printed 03-19-2013 08:19:49



1333CR001572

Version 2.0 - 11/06

CRIMINAL DOCKET DOCKET ENTRIES		DEFENDANT NAME Jemaul R Oliveira	DOCKET NUMBER 1333CR001572
DATE	DOCKET ENTRIES		
3/19/13	<p>(276-58A)</p> <p>Motion filed by Canon for delay hearing Atty Magaw ADA Rebecca Soderberg Disc # 456-1155 - caller. Soderberg</p> <p>Held on \$ w/o cash bail Judge Soderberg</p> <p>- motion filed by Atty Magaw - motion to suppress evidence preserve Acc'd. Soderberg</p>		
3-21-13	<p>Motion filed by Jennifer Magaw, Esq. - Motion for discovery Prior to G.C. 276, 58A Hearing Acc'd. Canon J</p>		
3/25/13	<p>Delay. Hearing - Atty Magaw ADA Struman Forester J Disc # of 11:08 Canon 1st witness - Dr. Dax PD (Peter Canon) x by dep. counsel. 11:15 Canon 2nd. witness - Dax. pd. Dr. St. R. St. Denis 11:36 Canon exhibit # 1 - picture x by defense counsel 11:43 Dep. Counsel 1st witness - Jessica Rubidoux 11:52 x by Canon 11:55 Dep's counsel. 2nd witness - Arthur Langwer 11:58 x by Canon 11:59 found to be a danger Held on \$ w/o cash 90 days 6-24-13 bail Judge Forester J</p>		

APPROVED ABBREVIATIONS

ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRP = Status review  
SRP = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWF = Continuance-without-finding scheduled to terminate PRO = Probation scheduled to terminate  
DFTA = Defendant failed to appear & was defaulted WAR = Warrant issued WARD = Default warrant issued WR = Warrant or default warrant recalled PVH = probation revocation hearing.

Date/Time Printed: 03-19-2013 08:19:49



1333CR001572

Version 2.0 - 11/05/

DOCKET CONTINUATION		NAME OF CASE	DOCKET NUMBER
		Jmaul Oliveira	1333CR001572
NO.	DATE	DOCKET ENTRIES	
	3/29/13	Motion filed by Atty. Jennifer Magaw	
	4/11/13	- motion and incorporated affidavit for funds for firearms expert <sup>JK</sup>	
		see allowed motion - J. Feenerty	
		ON 4-8-13 BAIL REVIEW SENT TO SUPERIOR COURT FOR REVIEW <sup>see below documentation</sup> ON 4-8-13 BY CN.	
	4-17-13	Motion for discovery filed & all 2 (Salina)	
		* This Δ went for bail review, which we don't have! Bail reduced by J. Dupuis on 4-11-13	
		Held on \$ <u>5,000</u> cash bail Judge _____	w/condition of GPS & home confinement! (See Salina's findings - she write up from attys paperwork!
	5/2/13	Re Probation (Donald G.) Habe in for 5/6/13 for GPS - 5P	
	5/6/13	Defendant to be bailed & GPS placed & scoled for 5/13/13. Welch J.	
	5-6-13	Bailed \$5,000 cash - surety Marissa L. Smith 155 Welch St., N13	

NO. DATE

DOCKET ENTRIES

5-15-13 Motion filed by Atty Jennifer Magaw  
- Motion to Modify Conditions Disc # 41  
- Motion allowed Lukman J  
\* see motion

5-21-13 Motion filed by Atty Jennifer Magaw  
- motion to modify #  
Withdrawn by Atty. Magaw

ARRESTED ON WARRANT ON 8-25-13 STVD  
FOR APPEARANCE ON 8-26-13 NBPD  
MM

In Court 8-26-13

alibi removed

8-26-13 Atty Magaw & ADA Paquette, Dusi  
69 a) 2:35 pm, request for 802 rewriter  
(Fennerty &) ~~all up to 60 days~~  
Denied

However Surety Present  
requesting bail!  
all id

Held on \$ 5,000 cash 50,000

bail Judge Fennerty J

9/18/13 pth (Mitt)

Please put on Mitt D must  
be bailed @ court, so  
G.P.S maybe put back in  
place!

BAIL REFUNDED  
CK # 987 AMT \$ 5000  
DATE: 9/26/13  
TO: Marissa Violet

DOCKET CONTINUATION		NAME OF CASE	DOCKET NUMBER
		Jamal L. Oliveira	1333CR 1572
NO.	DATE	DOCKET ENTRIES	
	9-25-13	Motion filed by Jennifer Magaw, Esq. (C.P.C.S.)	
		— Motion to Suppress Evidence	
		— Affidavit in support of Motion to Suppress Evidence	
		— Certificate of Service	
	10-1-13	Motion filed by <sup>Atty</sup> Jennifer Magaw (C.P.C.S.)	
		— Defendant's Motion to Compel Discovery	
		— Affidavit of Counsel	
		see docket 1333CR 1791	
		10-8-13 put of Court compliance	
	10/13/13	Atty Magaw requests bail	
		he reduced ADA Hendrie	
		Dose # 35 a) 10:59 am	
		Denied	
		Contd mer is obj	
		reg of Comm	
		11/1/13 Motion #3	
	11-1-13	Atty Magaw & ADA Hendrie	
		Dose # 3 a) 11:16 am Motion heard	
		* This motion is joined w/	
		1333CR 1576, Mitchell Violet	
		1st Witness - OFF. ST DENNIS	
		2nd Witness - Michael Sylva	



NO.	DATE	DOCKET ENTRIES
11-1-13		3rd witness - Jason Strobel COMM req further date to get add'l testimony from OFFICER who is NOT AVAILABLE (denied) under advisement
	11/18/13 22	(Mott)
	Ser#3	Cont.
11-12-13		(Motion Filed by Atty Jennifer Magaw) - Memorandum in support of Defendants motion to suppress evidence - Certificate of Service
11-20-13		Decision on Defendants motion to suppress evidence received from Judge Hand After review <del>Decision</del> motion allowed notified DA + atty Jennifer Magaw
11/20/13		Atty Magaw, ADA J. Hendrix Mary J. Discal 59/2:40 on reduction of bail released on personal 12/20/13 status CR#3 : / 2 PM
11-27-13		Motion Filed by the Commonwealth - Commonwealth Notice of Appeal - Motion to Enlarge Time to Apply For Leave to Proceed with Interlocutory Appeal Affidavit - all 2 (Salinas) EXTEND time to 12-31-13 - do not put in mcl

DOCKET CONTINUATION		NAME OF CASE	DOCKET NUMBER
		Jemal Olivera	13-1572
NO.	DATE	DOCKET ENTRIES	
	12-17-13	Motions filed for continuance <del>by</del> by Atty. Jennifer Magowan Motions allowed by J. Hession continued to 12-26-13 / 2 PM	
CR 3	1/20/14	Cont to 1/10/14 (Atty on companion case - Mitchell Colett is sick)	
Kirkman			
1-	10-14	cont end cd 27 2:00 CT 3 J. Finnors	
3	14-14	SRE CT 3 Doc #39	
	3/14/14	Cont. 6/20/14 Status Cr #3 Mother's J	
	6-12-14	Motions filed for continuance by Atty. Jennifer Magowan Motions allowed by J. Hession continued to 6/24/14 pthy contd	
	6-16-14	Notice of Docket Entry rec'd from Supreme Ct. & Order.	
		9-25-14 1 PM ITU!	
	8-1-14	Appearance filed by Atty. Emily Cardy (Cres Boston)	
	10/9/14	ERR - tth	
	10/9/14	DEF: Sabrina	
	10/9/14	<input checked="" type="checkbox"/> Default Warrant ISSD WMS <u>ma</u> <input type="checkbox"/> WARRANT ISSD WMS <input type="checkbox"/> RECALLED IN WMS <input type="checkbox"/> SERVED IN WMS	
	10-15-14	<input type="checkbox"/> Walk In To Remove Default <input type="checkbox"/> Warrant Never Issued <input type="checkbox"/> Default Warrant ISSD WMS <input type="checkbox"/> WARRANT ISSD WMS <u>EN</u> <input type="checkbox"/> RECALLED IN WMS <input type="checkbox"/> SERVED IN WMS	
	10/15/14	Defendant waived in spoke to probation	

NO.	DATE	DOCKET ENTRIES
		Officer dynamo program was held following day.
	10-17-14	SRE at Room 1
10/17/14		Atty Magan & PO Spencer Disc #45 at 11:46 AM By agreement B to Stay at Star Program 10/23/14 2PM ITU
	10/30/14	ITU
	12-18/14	SRE-ITU
	11-6/14	ITU SRE Cont'd (Salin)
	11/13/14	ITU 2PM
11/20/14		200 IN CD '49 Start 4:34 Detention Hearing Joseph M. [unclear] [unclear] [unclear] cont'd 11/25/14 ITU
12/4/14		100 IN
	12/11/14	ITU
<del>12/11/14</del>		<del>100 IN</del>
<del>12/30/14</del>		<del>100 IN</del>
1-22-15		PTH in ITU
1-29-15		ITU
2-5-15		ITU
2-12-15		ITU
2-26-15		ITU



COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS

DISTRICT COURT DEPARTMENT  
NEW BEDFORD DIVISION  
DOCKET NO. 1333 CR 1572; 1791

COMMONWEALTH

v.

JEMAUL OLIVEIRA

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

The defendant in the above-listed matter, Jemaul Oliveira, stands before the court charged with Shoplifting by Concealing in violation of M.G.L. ch. 266 § 30A, Possession of Ammunition Without an FID Card in violation of M.G.L. ch. 269 §10(h), Carrying a Firearm Without a License in violation of M.G.L. ch. 269 §10(a), and Carrying a Loaded Firearm Without a License in violation of M.G.L. ch. 269 §10(n). The latter two charges arise from a warrantless search of a vehicle belonging to the co-defendant in this matter on March 18, 2013 by officers of the Dartmouth Police Department. The defendant has moved this Honorable Court to suppress all fruits of that warrantless search.

A hearing regarding this Motion to Suppress was held on November 1, 2013. The Commonwealth presented one witness, Officer Robert St. Denis of the Dartmouth Police Department. The Defendant presented two witnesses: Michael Sylvia, who was the on-duty Loss Prevention Officer at the Dartmouth Kohl's store, and Jason Strobel, who was the on-duty Manager of the Dartmouth Kohl's store.

The undisputed facts are as follows: On March 18, 2013, at 4:37 in the afternoon, Dartmouth Police Officers were dispatched to the Kohl's department store to respond to a report

of two male shoplifters. The two males were later identified as Jemaul Oliveira and Mitchell Violet. Officer St. Denis testified that he spoke with the loss prevention officer, whose name he did not recall. He heard from that individual a description of the alleged shoplifting: Mr. Oliveira and Mr. Violet were observed in the Kohl's department store. Mr. Violet was first observed using a knife to cut open packages of cologne and then concealing the merchandise in his shirt pocket. Mr. Oliveira was then observed concealing a shirt and socks in his pants pocket. Mr. Violet ultimately paid for other merchandise, but both Mr. Violet and Mr. Oliveira left the store without paying for the concealed items. The loss prevention officer asked the two men to return to the store, which they did. Responding police officers Canuel, St. Denis, Morency, and Rapoza reported to the store's loss prevention office, where Mr. Oliveira and Mr. Violet were waiting with the loss prevention officer.

Officer St. Denis went on to testify that he was present for a conversation between Officer Morency and Mr. Violet during this initial encounter. Officer Morency asked Mr. Violet how he had gotten to the store that day, and Mr. Violet responded that he had come in a car. Mr. Violet later elaborated that although it was a car he drove and maintained, the car was actually registered to his girlfriend, Jessica Robidoux. Officer Morency then asked if there was any other stolen merchandise in the car. Mr. Violet responded there was a Kohl's bag, but that the items inside were lawfully purchased. Officer Morency then asked for permission to check that bag to confirm, and Mr. Violet gave permission to get the bag only. Officer St. Denis testified that he and Officer Morency obtained Mr. Violet's keys, went out to the car that had been described to them, and found it parked within the lines of a parking space in the lot of the Kohl's store. That parking lot was privately owned property which was open to the public. The keys were used to

unlock the car and the bag (which was in plain view) was removed. Back in the loss prevention office, the items in the bag were matched with a receipt that Mr. Violet produced.

At this point, the testimony of the Officer St. Denis and the testimony of Michael Sylvia and Jason Strobel diverge.

Officer St. Denis first testified that he was present for the decision to arrest the two defendants. He also testified that he was present for a conversation that occurred between another officer and the store manager. According to Officer St. Denis, the store manager was informed of the arrest and asked if he wanted the car that the defendants came in removed from the property, to which the store manager responded that he did. However, on March 25, 2013, mere days after the alleged incident, at a 58A hearing in New Bedford District Court before Judge Finnerty, Officer St. Denis testified that the decision to arrest the defendants and the discovery of the bullet in Mr. Oliveira's pocket was made while he was conducting the inventory search of the vehicle. Further, the officer's testimony on that date was that he learned of the bullet when he reentered the Kohl's building to discuss his discovery of the alleged firearm with Officer Canuel.

Next, Michael Sylvia was called by the Defendant. He testified that he was the loss prevention officer on duty in the afternoon on March 18, 2013. He went on to describe the events of that day, including the events that led up to the two defendants sitting in the loss prevention office waiting for the police to arrive. When the police did arrive, Mr. Sylvia testified that after speaking with the officers for a period of time, he left the loss prevention office to make copies of the defendant's IDs. When he returned, the defendants had been handcuffed. One of the police officers told him that a gun had been found in the car belonging to one of the defendants. Mr. Sylvia was then asked to bring the manager to loss prevention office.

Next, Jason Strobel was called by the Defendant. He testified that he was the manager on duty in the afternoon on March 18, 2013. On that date, he was summoned to the loss prevention office, where he was met by a police officer. The police officer told him that a gun had been found in the car belonging to one of the defendants. Then, the police officer asked Mr. Strobel if he would like the car removed from the property, to which Mr. Strobel responded in the affirmative. Although he could not recall the name of the officer or if any other officers were present when asked during cross-examination, Mr. Strobel did indicate that he remembered clearly this incident was the only incident involving a gun he had ever dealt with during the course of his employment.

At the hearing, the only basis for validity of the search the Commonwealth advanced was that the warrantless search was an inventory search.

#### ARGUMENT

Massachusetts courts have held that "searches conducted without valid warrants are presumed in the first instance to be unreasonable...[and][i]t is then up to the government to show that a particular search falls within a narrow class of permissible exceptions." Commonwealth v. Antobenedetto, 366 Mass. 51, 57 (1974) quoting Chimel v. California, 395 US 752, 762 (1969) ("[T]he general requirement that a search warrant be obtained is not lightly to be dispensed with, and the burden is on those seeking [an] exemption [from the requirement] to show the need for it."). Here, the Commonwealth contends that although there was no warrant to search Mr. Violet's vehicle, the Dartmouth Police Department conducted the search pursuant to the Department's inventory policy and thus a warrant was not needed.



I. THE DEFENDANT HAS AUTOMATIC STANDING TO CHALLENGE THE  
ILLEGAL SEARCH OF THE VEHICLE BELONGING TO CO-DEFENDANT  
MITCHELL VIOLET

Mr. Oliveira has automatic standing to challenge the search of the vehicle belonging to co-defendant Mitchell Violet because possession is an essential element of the charge that he “did knowingly [have] in his possession...a firearm... without either being present in or on his residence or place of business or having in effect a license to carry firearms.” M.G.L. ch. 269 §10(a). “When a defendant is charged with a crime in which possession of the seized evidence at the time of the contested search is an essential element of guilt, the defendant shall be deemed to have standing to contest the legality of the search and the seizure of the evidence.”

Commonwealth v. Amendola, 406 Mass. 592, 601 (1990).

Mr. Oliveira need not assert his own privacy interest in order to challenge the reasonableness of the searches of the co-defendants under the automatic standing rule. See Frazier, 410 Mass. 235, 244 n.3 (1991) (“Whether a defendant has standing under Amendola depends on allegations made by the Commonwealth, not on whether the defendant had a legitimate expectation of privacy in the area searched.”) As long as one co-defendant has an expectation of privacy in the area searched, and a possessory offense is alleged, the other co-defendants have standing to challenge that search. Commonwealth v. Duncan, 71 Mass.App.Ct. 150, 155 (2008)

In the instant case, Mr. Violet had a reasonable expectation of privacy in his vehicle. Since Mr. Oliveira is charged with a possessory offense, he may assert the privacy expectations of Mr. Violet in connection with the places searched and items seized. Thus, Mr. Oliveira need

not assert any privacy expectation of his own in order to challenge the seizure of the alleged contraband from the vehicle of the co-defendant.

**II. DARTMOUTH POLICE DID NOT HAVE A VALID PREDICATE TO SUPPORT THE IMPOUNDMENT OF MITCHELL VIOLET'S VEHICLE, AND THUS DID NOT HAVE A VALID PREDICATE TO SUBSEQUENTLY SEARCH SAID VEHICLE**

Under the Fourth Amendment of the United States Constitution and Article 14 of the Massachusetts Declaration of Rights, there is a two-pronged analysis to determine the validity of an inventory search of an impounded motor vehicle: the first of which is "whether the impoundment of the vehicle leading to the search meets constitutional strictures."

Commonwealth v. Ellerbe, 430 Mass. 769 (2000). The propriety of the impoundment of the vehicle is a threshold issue in determining the lawfulness of an inventory search of a motor vehicle. Commonwealth v. Garcia, 409 Mass. 675, 678 (1991).

The decision of this motion hinges on the Court's evaluation of the credibility of the witnesses that testified. At a suppression hearing, the judge has wide discretion to accept all, some, or none of a witness's testimony offered. Commonwealth v. Clark, 65 Mass. App. Ct. 39, 43 (2005). Here, the court must weigh the testimony of Officer St. Denis against the testimonies of Mr. Sylvia and Mr. Stobel, which are consistent with each other, but contradict the testimony of the officer.

Officer St. Denis testified that he reviewed the narrative written by Officer Canuel in preparation for the hearing on November 1, 2013. When confronted with his own sworn testimony given only days after the alleged incident, Officer St. Denis was unable to reconcile

the differences between the two versions. In his first version of events, Officer St. Denis testified that he was in Mr. Violet's car when the arrest was occurring and the bullet was found. When he returns indoors, he was informed of those occurrences. In the second version of events, Officer St. Denis testified that he was present during the arrest as well as the discussion between the store manager and another officer where the store manager gave permission for the car to be towed based on the arrest. In this version, the inventory search occurred after this conversation.

Additionally, Officer St. Denis has a stake in the matter being heard before the court; he is not an impartial witness. He was involved in the initial response and investigation, and he continues to be involved through court proceedings. He has reason now to want this case to turn out favorably for his department.

On the other hand, Michael Sylvia and Jason Strobel have no stake in the outcome of this motion to suppress or the case as a whole. To the contrary, they have every reason to testify to the detriment of the Defendant, who stands accused of stealing from their store. Moreover, Mr. Strobel and Mr. Sylvia, in their positions in the retail industry, have every reason to maintain a good working relationship with the police officers who are charged with apprehending suspects from their stores, and the prosecutors who are charged with bringing those suspect to justice.

The testimonies of Mr. Sylvia and Mr. Strobel stand in stark contrast to the testimony of Officer St. Denis. Michael Sylvia testified after finishing up administrative business and returning to the loss prevention office, he was told by officers that a gun had been found in one of the defendant's vehicles. After that, he testified that an officer requested he find the store manager, Mr. Strobel.

Officer St. Denis points to Mr. Strobel as being the individual that authorized the tow of Mr. Violet's vehicle. Mr. Strobel did not dispute this point; in fact, he was quite clear that he did

give an officer permission to tow the car. However, this permission was given based on an officer's statement that a gun had been found in that car. It would logically follow that officers were conducting a search before they received permission to tow the vehicle, rendering the search baseless and unconstitutional. Despite his memory being called into question during cross examination, Mr. Strobel testified on re-direct examination that this is the only incident involving a gun at his store that has occurred in the years he's worked there. Unlike police officers, who deal with cases involving dangerous weapons day in and day out, members of the general public do not often encounter firearms in their places of business. Considering that as store manager, Mr. Strobel has seen many incidents at his store, undoubtedly many of a criminal nature, and has only once encountered a firearm gives credence to the Defendant's assertion that his testimony is credible.

### **III. DARTMOUTH POLICE DID NOT CONDUCT AN INVENTORY SEARCH PURSUANT TO THEIR DEPARTMENT'S WRITTEN POLICY**

The second prong of the test established in *Ellerbe* is "whether the conduct and scope of the search itself meets those strictures [of the inventory policy]." *Ellerbe* at 773. At the hearing on this motion, a relevant policy was introduced by the Commonwealth. This policy does allow for the impoundment of vehicles on private property upon the request of a property owner. For the same reasons as previously stated, Officer St. Denis's testimony that permission had been obtained prior to the search is not credible, and therefore, the conduct of the officers participating in the inventory search did not comply with the written policy.

IV. WITHOUT PERMISSION FROM THE PROPERTY OWNER TO TOW THE VEHICLE, THERE WAS NO OTHER REASON ADVANCED AS JUSTIFICATION FOR THE IMPOUNDMENT OF MR. VIOLET'S VEHICLE

The impoundment of a vehicle lawfully parked in a parking lot associated with a defendant's arrest is unlawful unless there is evidence that a vehicle poses a safety hazard or is at risk of theft or vandalism. Commonwealth v. Brinson, 440 Mass. 609, 614 (2004). Moreover, without a showing of a safety hazard or risk of theft or vandalism, police may not exercise their community caretaking function to impound a vehicle left unattended in a privately owned parking lot. Id. at 615-6. Stated more simply, unless the Commonwealth introduces evidence of a safety hazard or a risk of theft or vandalism, police may not substitute their judgment for that of the property owner's and take it upon themselves to relieve a property owner of the burden of removing vehicle.

In *Brinson*, police officers impounded and conducted an inventory search of a vehicle that was parked in a privately owned lot after the defendant had been arrested in the vicinity. The inventory search was conducted pursuant to a written police policy that allowed officers to impound a suspect's vehicle which would otherwise be left unattended due to an arrest. The court determined such a policy, by itself, was not enough to lawfully impound the suspect's car, and that none of the aforementioned circumstances existed. Thus, without permission of the owner of the lot, the impoundment and subsequent search of the car was found to be unlawful. Brinson at 617.

In the present case, as previously stated, there was conflicting testimony of when and what permission was obtained. However, the two independent witnesses called by the Defendant, Michael Sylvia and Jason Strobel, both consistently stated that the car had already been searched

and an alleged firearm already found before permission was sought. If, according to these witnesses, permission was obtained after the search, officers would have needed one of the "attending circumstances" referenced in *Brinson* to otherwise justify impoundment. No testimony whatsoever was offered that Mr. Violet's car was a safety hazard, nor was any testimony offered that there was a threat of vandalism or theft.

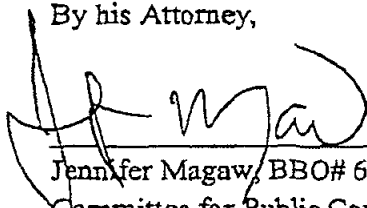
### CONCLUSION

For all the foregoing reasons, the defendant respectfully moves this Honorable Court to credit the testimony of Michael Sylvia and Jason Strobel, and suppress all fruits of the warrantless search of co-Defendant Mitchell Violet's vehicle.

Respectfully submitted,

Jemaul Oliveira

By his Attorney,



Jennifer Magaw, BBO# 685184

Committee for Public Counsel Services

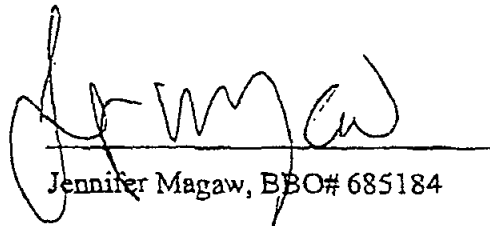
700 Purchase Street, Suite 420

New Bedford, MA 02740

T: (508) 997-3301 F: (508) 991-5012

### Certificate of Service

I, Jennifer Magaw, certify that the enclosed has been served on the Commonwealth by facsimile on this date, November 8, 2013.



Jennifer Magaw, BBO# 685184

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

NEW BEDFORD DISTRICT COURT  
DOCKET NO. 1333CR 1572, -1791

COMMONWEALTH

v.

JEMAUL OLIVIERA.

MEMORANDUM OF DECISION  
ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

This matter came before me on November 1, 2013 for hearing on the defendant's motion to suppress evidence obtained during, or as the result of, a search of a car. For the reasons below, the motion to suppress is ALLOWED.

Based on the credible evidence presented at the hearing, I find the following facts. On Monday, March 18, 2013, at approximately 4:30 p.m., Dartmouth police officer Robert St. Denis was dispatched to the Kohl's department store in Dartmouth in response to a request from the Kohl's loss prevention department. St. Denis understood that Kohl's loss prevention agents were holding two men on suspicion of shoplifting.

Arriving at the Kohl's store at approximately the same time as another Dartmouth officer, Morency, St. Denis went to the loss prevention office where he encountered Mitchell Violet and Jemaul Oliveira, now co-defendants. St. Denis was made aware that Violet and Oliveira had been detained by Kohl's loss prevention officers after the loss prevention officers determined that each of the co-defendants had selected items from the store, paid for some of those items, but left the store without paying for other of the items that each held. St. Denis

Commonwealth v. Jemaul Oliveira, Docket No. 1333CR1572, -1791

told the defendants that the police had been called in response to the shoplifting complaint. He eventually asked the defendants how they had arrived at the Kohl's. Violet told the police that he had driven "his" car; the car was, however, registered to Violet's girlfriend. Morency asked Violet for permission to search the car for a bag of Kohl's merchandise. Violet agreed to allow the police to enter and search the car for the Kohl's merchandise; he provided the police with his car keys. The police went to the car, which was properly parked in a marked parking spot. They used the defendant's key to open it, and found the bag in plain view. The police brought the bag into the store and learned that one of the defendants had a receipt for the merchandise in that bag.

The police arrested the defendants for shoplifting and told the defendants that the car that they had arrived in would be inventoried and towed. The defendants, who had been matter-of-fact and cooperative with the police and loss prevention officers to this point, became visibly agitated. Violet told the police that he wanted his girlfriend, the registered owner of the car, to come and pick the car up; he did not want the car inventoried or towed. The car was legally parked in a parking space in the Kohl's parking lot, well within business hours. There was no indication that the registered owner of the car was unable or unwilling to come retrieve the car. The police advised the Kohl's manager that the car might remain in the parking lot overnight; on the evidence at the hearing, this prediction was completely speculative, as no one made an effort to find out whether the owner of the car would come get it, and if so, when. The manager did not want the car to remain there and asked the police to remove it. The Dartmouth Police Department's tow policy permits the police to tow a vehicle,



among other scenarios, “[p]ursuant to a lawful arrest when the vehicle would be left unattended.” While the tow policy permits the police to forego an inventory “if the vehicle is; [l]egally parked and locked; . . . [and/or] [r]emoved by a third party,” the inventory policy does not require the police to allow an arrestee to contact a third party to arrange for private removal of the vehicle. In this instance, although Violet expressed a desire to have the owner of the car come to retrieve it, the police did not honor that request. Instead, they conducted an inventory search.

The police searched the car, adhering to the inventory policy limits. In searching the unlocked glove compartment, the police found what they believed to be a firearm, loaded and unlocked.<sup>1</sup> Either while this inventory search was going on, or shortly after the inventory search was undertaken, the police pat-frisked the defendants and discovered a bullet in the possession of one of them. The police were not aware that the defendants had a bullet in the possession of one or the other of them until after the suspected gun had been found in the car’s glove compartment.

The search here was a “true” inventory search, in that it was intended to secure the defendant’s vehicle and its contents as the vehicle was towed and stored; it was not a pretext for an investigatory search.

“A lawful inventory search is contingent on the propriety of the impoundment of the car.” *Commonwealth v. Brinson*, 440 Mass. 609, 612, 800 N.E.2d 1032 (2003). “Under both the Federal and Massachusetts Constitutions, analysis of the legitimacy of an inventory search of an impounded vehicle involves two related, but distinct, inquiries: (1) whether the impoundment of the vehicle

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<sup>1</sup> The Commonwealth did not introduce a copy of the inventory sheet at the hearing.

leading to the search meet[s] constitutional strictures, and (2) whether the conduct and scope of the search itself meet those strictures.'" *Commonwealth v. Henley*, 63 Mass.App.Ct. 1, 5, 822 N.E.2d 313 (2005), quoting *Commonwealth v. Ellerbe*, 430 Mass. 769, 772-773, 723 N.E.2d 977 (2000).

*Commonwealth v. Trinidad-Franco*, 2007 Mass. Super. LEXIS 565 (Mass. Super. Ct. Dec. 12, 2007).

The question at issue here is whether the police acted constitutionally in seizing the defendant's car without providing the defendants an opportunity to make other reasonable arrangements for the car's removal from the lot: specifically, arranging for the owner of the car to come and get it. The answer is case-specific: our courts have not recognized a "general" obligation on the police to explore an arrestee's ability to make private arrangements for removal of a vehicle otherwise subject to a written inventory tow policy. *See, e.g., Commonwealth v. Caceres*, 413 Mass. 749, 751-752 (1992). Rather, the Supreme Judicial Court has said,

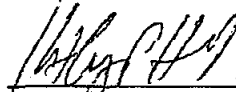
"[i]n our view, adopting any per se rule whether such a rule applies to an owner or a driver contravenes the proper constitutional analysis -- the touchstone of reasonableness that itself necessitates a case-by-case analysis that takes into account the numerous and varied situations in which decisions to impound are made. *See Coolidge v. New Hampshire*, 403 U.S. 443, 509-510, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) (Black, J., concurring and dissenting) ("The relevant test [whether the Fourth Amendment has been violated] is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances. The test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts"). *See also Landry v. Attorney Gen.*, 429 Mass. 336, 348, 709 N.E.2d 1085 (1999), and cases cited (Fourth Amendment violations occur only if search or seizure is unreasonable)."

*Commonwealth v. Eddington*, 459 Mass. 102, 111 (2011).

*Commonwealth v. Jemaul Oliveira*, Docket No. 1333CR1572, -1791

In this case, there was nothing about the defendants' behavior or about the items initially found in the consent search of the vehicle that would have given rise to a suspicion that allowing the car to remain in the Kohl's lot until the owner could retrieve it would pose any risk of harm to the public. Violet's request that the car not be towed and that its owner be permitted to come get it was, at that point, reasonable. While the search of the car was within the boundaries of the inventory search policy, the seizure of the car was not reasonable. The motion to suppress is ALLOWED.

DATED: November 19, 2013

  
Kathryn E. Hand

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

DISTRICT COURT DEPARTMENT  
No. 1333CR157~~2~~

COMMONWEALTH

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V.

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COMMONWEALTH'S NOTICE OF

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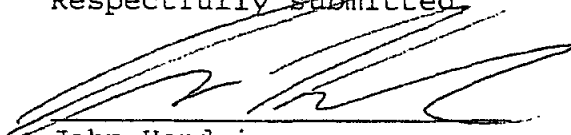
APPEAL

JEMAUL OLIVEIRA

)

The Commonwealth hereby files its Notice of  
Appeal from the November 19, 2013 Order of the  
District Court (Hand, K.) allowing the defendant's  
Motion to Suppress.

Respectfully submitted,



John Hendrie  
Assistant District Attorney  
Bristol District  
BBO # 675430  
P.O. Box 973  
888 Purchase Street  
New Bedford, MA 02741  
(508) 997-0711

November 26, 2013

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

DISTRICT COURT  
No. 1333CR1572

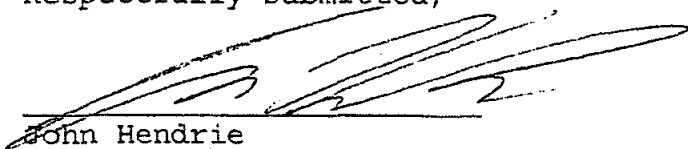
COMMONWEALTH )  
 )  
V. ) COMMONWEALTH'S MOTION TO  
 ) ENLARGE TIME TO APPLY  
JEMAUL OLIVEIRA ) FOR LEAVE TO PROCEED WITH  
 ) INTERLOCUTORY APPEAL

*Allowed  
Sabra J  
11-27-13*

Pursuant to Mass. R. Crim. P. 15(b)(1) and  
Supreme Judicial Court Standing Order: Applications to  
a Single Justice Pursuant to Mass. R. Crim. P.

February 1, 1997), the Commonwealth  
respectfully requests this Court to enlarge to  
December 31, 2013 the time for the Commonwealth to  
apply for leave to appeal from the allowance of the  
defendant's Motion to Suppress. Additional time is  
necessary to prepare the application, as explained in  
more detail in the attached affidavit.

Respectfully submitted,

  
John Hendrie  
Assistant District Attorney  
Bristol District  
BBO # 675430  
P.O. Box 973  
888 Purchase Street  
New Bedford, MA 02741  
(508) 997-0711

Date: November 25, 2013

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

DISTRICT COURT DEPARTMENT  
No. 1333CR1572

COMMONWEALTH

V.

JEMAUL OLIVEIRA

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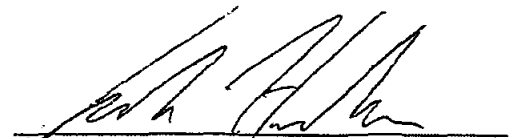
AFFIDAVIT IN SUPPORT OF COMMONWEALTH'S MOTION TO  
ENLARGE TIME TO APPLY FOR LEAVE TO PROCEED WITH  
INTERLOCUTORY APPEAL

I do hereby state as follows:

1. I am an Assistant District Attorney assigned to the district court division of the Office of the District Attorney for the Bristol District;
2. On November 19, 2013, the District Court (Hand, K.) entered an order allowing the defendant's motion to suppress;
3. I have reviewed the judge's decision, as well as other relevant documents, and believe that there may be a basis to pursue an interlocutory appeal. I have spoken to the Chief of Appeals, David Mark, about this case. A final determination as to whether to pursue this matter further will be made after reviewing the audio recordings made of the suppression hearing and after consulting with First Assistant Tom Quinn. I anticipate that a final decision as to whether to pursue this matter further will be made within the next two weeks.
4. By Supreme Judicial Court Standing Orders (Applications to a Single justice Pursuant to Mass R. Crim. P. 15(a)(2)), the Commonwealth must files its application "within seven days of the issuance of notice of the order being appealed, or such additional time as either the trial judge or the single justice of the Supreme judicial Court shall order . . . ."

5. The Appeals Division is assigned to handle a number of appeals and therefore need additional time to complete an application to the single justice.
6. I therefore request until December 31, 2013 for the Commonwealth to file its application for leave to proceed with interlocutory appeal.

Signed under the pains and penalties of perjury  
this twenty fifth day of November 2013.



John Hendrie  
Assistant District Attorney

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPREME JUDICIAL COURT  
SINGLE JUSTICE SESSION  
NO. \_\_\_\_\_

NEW BEDFORD DISTRICT COURT  
NOS. 1333CR1576  
1333CR1572

COMMONWEALTH

v.

MITCHELL VIOLET and JEMAUL OLIVEIRA

COMMONWEALTH'S APPLICATION FOR LEAVE TO  
PROCEED WITH INTERLOCUTORY APPEAL

Pursuant to Mass. R. Crim. P. 15(a)(2) and the Supreme Judicial Court standing order of February 1, 1997, the Commonwealth respectfully applies to this Honorable Court for leave to file an interlocutory appeal from the findings and rulings of Hand, J., sitting in New Bedford District Court, on the above cases, docket numbers 1333CR1576 and 1333CR1572, allowing the defendants' Motions to Suppress. The Commonwealth further argues that it would be appropriate for the Single Justice to retain jurisdiction over this case and decide the matter on its merits. See Mass. R. Crim. P. 15(a)(2) ("If the single justice determines that the administration of justice would be facilitated, the justice may grant that leave and may hear the appeal or



may report it to the full Supreme Judicial Court or to the Appeals Court.") (emphasis added). In support of this application, the Commonwealth says the following:

1. On March 18, 2013, at approximately 4:30P.M., Dartmouth Police officers responded to Kohl's department store in Dartmouth for a report of shoplifting. Officer St. Dennis learned that co-defendants Mitchell Violet and Jemaul Oliveira were observed leaving the store without paying for certain items. Both men were arrested. [CRA.19-21].<sup>1</sup>
2. In speaking with Violet and Olivera, Officer St. Dennis learned that they arrived at the store in a vehicle registered to Violet's girlfriend. The girlfriend's vehicle was legally parked in the store's parking lot. The manager of the store told officers that he did not want the car to remain in the parking lot. Accordingly, officers had the vehicle inventoried and towed. The police did so despite Violet's stated preference that his girlfriend, the registered owner of the car, be allowed to come and pick it up. [CRA.19-21].

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<sup>1</sup> References to the record will be cited as [CRA.(page #)].

4. In the process of searching the vehicle pursuant to the Dartmouth Police Department's tow policy, the police opened the glove box and discovered a loaded firearm. [CRA.20].

5. On March 19, 2013, a two count complaint issued against Violet, charging him with carrying a firearm without a license and shoplifting. On the same day, a three count complaint issued against Oliveira, charging him with carrying a firearm without a license, possession of ammunition without a license, and shoplifting. [CRA.1-2].

6. The defendants each filed motions to suppress, arguing that the search of the vehicle was not constitutionally justified. Both motions were joined together for consideration and, on November 20, 2013, Judge Hand allowed the motions to suppress in a written memorandum of decision. [CRA.7-8,15-16].<sup>2</sup>

6. Another justice of the New Bedford District Court, Sabra, J., has granted the Commonwealth an

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<sup>2</sup> In the case caption of Judge Hand's decision, she only included Violet's name and the docket number associated with his case and made no mention of Oliveria's case. But it is clear from reviewing the decision, and from the docket sheets associated with both cases, that Judge Hand's decision applied to both defendants. Accordingly, the Commonwealth filed a notice of appeal in both cases.

extension until December 31, 2013 to file its application for leave to appeal. The Commonwealth filed its notices of appeal on November 27, 2013. [CRA.8,16].

7. This matter is next scheduled for a January 10, 2014 status hearing.

8. The Commonwealth expects that a trial would last approximately 1-2 days.

9. It is the Commonwealth's contention that Judge Hand's allowance of the defendants' motions to suppress is erroneous. This contention is developed in detail in the Commonwealth's Memorandum of Law in support of this application.

10. As the motion judge has suppressed all evidence obtained from the search of the vehicle, the Commonwealth has no other evidence of the defendants' guilt on the firearm charges (the less serious counts of shoplifting remain unaffected by the judge's decision). Where the motion judge's order of suppression is premised on a misunderstanding of the law, the Commonwealth should be permitted to seek reversal of that order, so that it may present at the defendant's trial in this very serious case evidence of the defendant's guilt.

Respectfully submitted,  
FOR THE COMMONWEALTH

---

David J. Gold  
Assistant District Attorney  
Bristol District  
BBO# 667611  
888 Purchase Street  
New Bedford, MA 02741  
(508) 997-0711

Dated: March 24, 2015

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPREME JUDICIAL COURT  
SINGLE JUSTICE SESSION  
NO. \_\_\_\_\_

NEW BEDFORD DISTRICT COURT  
NOS. 1333CR1576  
1333CR1572

COMMONWEALTH

v.

MITCHELL VIOLET and JEMAUL OLIVEIRA

MEMORANDUM OF LAW IN SUPPORT OF COMMONWEALTH'S  
APPLICATION FOR LEAVE TO PROCEED WITH  
INTERLOCUTORY APPEAL

I. STATEMENT OF FACTS

In allowing the defendant's motion to suppress, the motion judge made the following findings of facts "[b]ased on the credible evince presented at the hearing":

On Monday, March 18, 2013, at approximately 4:30 p.m., Dartmouth police officer Robert St. Denis was dispatched to the Kohl's department store in Dartmouth in response to a request from the Kohl's loss prevention department. St. Denis understood that Kohl's loss prevention agents were holding two men on suspicion of shoplifting.

Arriving at the Kohl's store at approximately the same time as another Dartmouth officer, Morency, St. Denis went to the loss prevention officer where he encountered Mitchell Violet and Jemaul Oliviera, now co-defendants. St. Denis was made aware that Violet and Oliviera had been detained by Kohl's loss prevention officers after the loss prevention officers determined that each of the co-defendants had selected

items from the store, paid for some of those items, but left the store without paying for other of the items that each held. St. Denis told the defendant that the police had been called in response to the shoplifting complaint. He eventually asked the defendants how they had arrived at the Kohl's. Violet told the police that he had driven "his" car; the car was, however, registered to Violet's girlfriend. Morency asked Violet for permission to search the car for a bag of Kohl's merchandise. Violet agreed to allow the police to enter and search the car for the Kohl's merchandise; he provided the police with his car keys. The police went to the car, which was properly parked in a marked parking spot. They used the defendant's key to open it, and found the bag in plain view. The police brought the bag into the store and learned that one of the defendants had a receipt for the merchandise in that bag.

The police arrested the defendant for shoplifting and told the defendants that the car that they had arrived in would be inventoried and towed. The defendants, who had been matter-of-fact and cooperative with the police and loss prevention officers to this point, became visibly agitated. Violet told the police that he wanted his girlfriend, the registered owner of the car, to come and pick the car up; he did not want the car inventoried or towed. The car was legally parked in a parking space in the Kohl's parking lot, well within business hours. There was no indication that the registered owner of the car was unable or unwilling to come retrieve the car. The police advised the Kohl's manager that the car might remain in the parking lot overnight; on the evidence at the hearing, this prediction was completely speculative, as no one made an effort to find out whether the owner of the car would come get it, and if so, when. The manager did not want the car to remain there and asked the police to remove it. The Dartmouth Police Department's tow policy permits the police to tow a vehicle, among other scenarios, "pursuant to a lawful arrest when the vehicle would be left unattended." While the tow policy permits the police to forego an inventory "if the vehicle is; [l]egally parked and locked; . . . [and/or] [r]etrieved by a third party," the inventory policy does not require the police to allow an arrestee to contact a third party to arrange for private removal of the vehicle.

In this instance, although Violet expressed a desire to have the owner of the car come to retrieve it, the police did not honor that request. Instead, they conducted an inventory search.

The police searched the car, adhering to the inventory policy limits. In searching the unlocked glove compartment, the police found what they believed to be a firearm, loaded and unlocked. Either while this inventory search was going on, or shortly after the inventory search was undertaken, the police pat-frisked the defendant and discovered a bullet in possession of one of them. The police were not aware that the defendant had a bullet in the possession of one or the other of them until after the suspected gun had been found in the car's glove compartment.

[A.19-21].

#### ARGUMENT

**THE MOTION JUDGE ERRED IN ALLOWING THE DEFENDANT'S MOTION TO SUPPRESS: IT IS WELL SETTLED THAT THE POLICE ARE NOT OBLIGATED TO CONTACT THE OWNER OF A VEHICLE BEFORE TOWING IT PURSUANT TO A LAWFUL INVENTORY POLICY.**

"In reviewing a ruling on a motion to suppress, [an appellate court] accept[s] the judge's subsidiary findings of fact absent clear error . . . [but] . . . review[s] independently the motion judge's application of constitutional principals to the facts found."

*Commonwealth v. Franklin*, 456 Mass. 818, 820 (2010).

Here, the motion judge found that "[t]he search here was a 'true' inventory search, in that it was intended to secure the defendant's vehicle and its contents as the vehicle was towed and stored; it was not a pretext for an investigatory search." [A.21].

According to the motion judge "[t]he question at issue here is whether the police acted constitutionally in seizing the defendant's car without providing the defendants an opportunity to make other reasonable arrangements of the car's removal from the lot: specifically, arranging for the owner of the car to come and get it." [A.22]; see also *Commonwealth v. Garcia*, 409 Mass. 675, 678 (1991) (concerning inventory search, "the propriety of the impoundment of the vehicle is a threshold issue in determining the lawfulness of the inventory search"). In concluding that the seizure and search of the vehicle was unreasonable, and thus unconstitutional, the motion judge reasoned as follows:

In this case, there was nothing about the defendant's behavior or about the items initially found in the consent search of the vehicle that would have given rise to a suspicion that allowing the car to remain in the Kohl's lot until the owner could retrieve it would pose any risk of harm to the public. Violet's request that the car not be towed and that its owner be permitted to come get it was, at that point, reasonable. While the search of the car was within the boundaries of the inventory search policy, the seizure of the car was not reasonable.

[A.23].

But as the motion judge herself recognized, "court have not recognized a 'general' obligation to



the police to explain an arrestee's ability to make private arrangements for removal of a vehicle otherwise subject to a written inventory tow policy." [A.22]. Indeed, in *Commonwealth v. Eddington*, 459 Mass. 102, (2011), the Supreme Judicial Court expressly held that the police are not obligated to contact the owner of a vehicle before towing it pursuant to a lawful inventory policy. In *Eddington*, the defendant was arrested after a motor vehicle stop. At the time, the vehicle was lawfully parked on the side of the road. The vehicle that the defendant had been using did not belong to him and rather than calling the owner of the vehicle to come retrieve it, the police decided to inventory and tow the vehicle. *Id.* at 105-106. During the inventory, officers found a firearm and ammunition. *Id.* at 106. A district court judge allowed the defendant's motion to suppress, reasoning that "[b]ecause the automobile was lawfully parked impoundment could only be justified if there was a risk of theft or threat of vandalism, which the judge determined that the Commonwealth did not show." *Id.* In reversing the district court judge's conclusion, the SJC reasoned, in part as follows:

[T]he owner of the automobile, Rodriguez, was not present at the scene to express a preference on the vehicle's disposition. In accordance with our past precedent, the police were not constitutionally obligated to contact her.

*Id.*; see also *Commonwealth v. Ellerbe*, 430 Mass. 769, 776 (2000) ("Reasonableness did not require police officers to guard the vehicle or to wait with the unlicensed passenger until a licensed driver could be produced to take control of it."); *Commonwealth v. Henley*, 63 Mass. App. Ct. 1, 6 (2005) (police had no constitutional obligation to contact, in early morning hour, owner of vehicle, which was rental company, or authorized driver under rental agreement who was not present at stop).

The motion judge cites to *Eddington* in her decision but inexplicably concludes that "Violet's request that the car not be towed and the owner be permitted to come get it was, at that point, reasonable." [A.23]. But *Eddington* makes clear that Violet's preference for the manner in which the car was removed from the parking lot is beside the point. The manager of the store wanted the vehicle out of the parking lot, the owner of the vehicle was not present at the time of the defendants were arrested, and the police had no constitutional obligation to contact her

(or allow the defendants to do so) prior to towing the vehicle. The police acted properly in seizing and searching the vehicle.

**CONCLUSION**

For the foregoing reasons, this Court should allow the Commonwealth's Application for Leave to Proceed with Interlocutory Appeal and decide the matter on its merits.

Respectfully submitted,

C. SAMUEL SUTTER  
District Attorney

---

David J. Gold  
Assistant District Attorney  
Bristol District  
BBO # 667611  
P.O. Box 973  
888 Purchase Street  
New Bedford, MA 02741  
(508) 997-0711  
David.j.gold@state.ma.us

Dated: December 27, 2013



The Commonwealth of Massachusetts

SUPREME JUDICIAL COURT

FOR SUFFOLK COUNTY

JOHN ADAMS COURTHOUSE

ONE PEMBERTON SQUARE, SUITE 1300

BOSTON, MASSACHUSETTS 02108-1707

WWW.SJCCOUNTYCLERK.COM

MAURA S. DOYLE

CLERK

CASE INFORMATION (617) 557-1100

FACSIMILE (617) 557-1117

ATTORNEY SERVICES (617) 557-1050

FACSIMILE (617) 557-1055

June 11, 2014

New Bedford Dist. Court/Criminal  
Office of the Clerk  
75 North Sixth Street  
New Bedford, MA 02740

RE: No. SJ-2013-0501

COMMONWEALTH

VS.

MITCHELL VIOLET and JEMAU OLIVEIRA

New Bedford District Court  
No.1333CR1572, 1333CR1576

NOTICE OF DOCKET ENTRY

You are hereby notified that on June 11, 2014, the following was entered on the docket of the above referenced case:

ORDER: Interlocutory appeal allowed; to Appeals Court. (Duffly, J.)

Maura S. Doyle, Clerk

To: David B. Mark, Assistant District Attorney  
Jennifer Magaw, Esquire  
Steven M. Bausman, Esquire  
New Bedford Dist. Court/Criminal  
Appeals Court / Comm. of Mass.

FILED  
JUN 11 2014  
CLERK

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
NO: SJ-2013-0501

DISTRICT COURT DEPARTMENT  
NEW BEDFORD DISTRICT COURT  
1333CR001572  
1333CR001576

COMMONWEALTH

VS.

MITCHELL VIOLET and JEMAU OLIVEIRA

ORDER

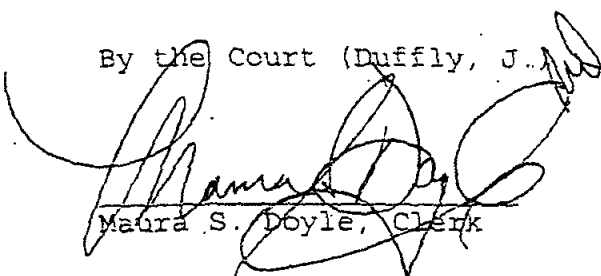
The Commonwealth seeks leave to pursue an interlocutory appeal, pursuant to Mass. R. Crim. P. 15(a)(2), of a District Court judge's allowance of a motion to suppress evidence seized during an inventory search of a vehicle owned by one of the defendants' sisters.

Upon consideration, it is ORDERED that the Commonwealth's application for leave to pursue an interlocutory appeal be, and hereby is, ALLOWED.

It is FURTHER ORDERED that the interlocutory appeal shall proceed in the Appeals Court and that the Criminal Clerk's Office of the New Bedford District Court shall assemble the records in docket nos. 1333CR001572 and 1333CR001576 and transmit the records to the Clerk's Office of the Appeals Court, John Adams Courthouse,

One Pemberton Square, Room 1-200, Boston, Massachusetts, 02108-1705.

By the Court (Duffly, J.)

  
Maura S. Doyle, Clerk

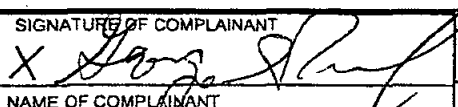
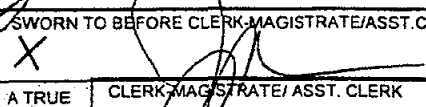

Entered: June 11, 2014

<b>CRIMINAL COMPLAINT</b> ORIGINAL		DOCKET NUMBER 1333CR001791	NO. OF COUNTS 1	<b>Trial Court of Massachusetts District Court Department</b>	
DEFENDANT NAME & ADDRESS Jemaul R Oliveira 155 Willis Street New Bedford, MA 02740				COURT NAME & ADDRESS New Bedford District Court 75 North Sixth Street New Bedford, MA 02740 (508)999-9700	
DEFENDANT DOB 10/21/1987	COMPLAINT ISSUED 03/27/2013	DATE OF OFFENSE 03/18/2013	ARREST DATE		
OFFENSE CITY / TOWN Dartmouth		OFFENSE ADDRESS		NEXT EVENT DATE & TIME 04/17/2013 8:00 AM	
POLICE DEPARTMENT DARTMOUTH PD		POLICE INCIDENT NUMBER 13-115WA		NEXT SCHEDULED EVENT Arraignment	
OBTN				ROOM / SESSION Arraignment Session	
<p>The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date(s) indicated below the defendant committed the offense(s) listed below and on any attached pages.</p>					

COUNT	CODE	DESCRIPTION
1	269/10/EE	FIREARM, CARRY WITHOUT LICENSE LOADED c269 s.10(n)

On 03/18/2013 did knowingly have in his or her possession, or under his or her control in a vehicle, a loaded firearm or a loaded rifle or shotgun, as defined in G.L. c.140, § 121 or G.L. c.269, § 10(n), not then being present in his or her residence or place of business, and not having in effect a license to carry firearms or otherwise being authorized by law to do so, in violation of G.L. c.269, § 10(a) & (n).

(PENALTY for violation of §10(a): state prison not less than 2½ years, not more than 5 years; or jail or house of correction not less than 18 months, not more than 2½ years; no continuance without a finding, filing, or suspended sentence; no probation, parole, work release, furlough, or sentence deduction for good conduct until 18 months served; §10(e): firearm, rifle or shotgun to be ordered forfeited. PLUS additional sentence pursuant to §10(n): jail or house of correction not more than 2½ years from and after expiration of sentence for violation of §10(a).)

SIGNATURE OF COMPLAINANT 	SWORN TO BEFORE CLERK/MAGISTRATE/ASST. CLERK/DEP. ASST. CLERK 		DATE 4/17/13
NAME OF COMPLAINANT Jemaul R Oliveira	A TRUE COPY ATTEST 	CLERK/MAGISTRATE/ASST. CLERK	DATE

**Notice to Defendant:** 42 U.S.C. § 3796gg-4(e) requires this notice: If you are convicted of a misdemeanor crime of domestic violence you may be prohibited permanently from purchasing and/or possessing a firearm and/or ammunition pursuant to 18 U.S.C. § 922 (g) (9) and other applicable related Federal, State, or local laws.

<b>CRIMINAL COMPLAINT</b> PROSECUTOR COPY		DOCKET NUMBER 1333CR001576	NO. OF COUNTS 2	<b>Trial Court of Massachusetts</b> <b>District Court Department</b>
DEFENDANT NAME & ADDRESS Mitchell T Violet 284 England Street Apt#2 New Bedford, MA 02745				COURT NAME & ADDRESS New Bedford District Court 75 North Sixth Street New Bedford, MA 02740 (508)999-9700
DEFENDANT DOB 04/05/1988	COMPLAINT ISSUED 03/19/2013	DATE OF OFFENSE 03/18/2013	ARREST DATE 03/18/2013	
OFFENSE CITY / TOWN Dartmouth	OFFENSE ADDRESS		NEXT EVENT DATE & TIME 03/19/2013 9:00 AM	
POLICE DEPARTMENT DARTMOUTH PD	POLICE INCIDENT NUMBER 13-124-AR		NEXT SCHEDULED EVENT Arraignment	
OBTN TDAR201300124			ROOM / SESSION Arraignment Session	
The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date(s) indicated below the defendant committed the offense(s) listed below and on any attached pages.				

COUNT	CODE	DESCRIPTION
1	266/30A/D	SHOPLIFTING BY CONCEALING MDSE c266 §30A

On 03/18/2013 did intentionally conceal merchandise offered for sale by ( Kohl's ), a store or other retail mercantile establishment, with the intention of depriving the merchant of the proceeds, use or benefit of such merchandise, or converting the same to the defendant's use without paying the merchant the value thereof, in violation of G.L. c.266, §30A, second par.

PENALTY: not more than \$250.

2	269/10/J	FIREARM, CARRY WITHOUT LICENSE c269 s.10(a)
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On 03/18/2013 did knowingly have in his or her possession, or under his or her control in a vehicle, a firearm, as defined in G.L. c.140, s.121, or a rifle or shotgun, not then being present in his or her residence or place of business, and not having in effect a license to carry firearms or otherwise being authorized by law to do so, in violation of G.L. c.269, s.10(a).

PENALTY: state prison not less than 2 1/2 years not more than 5 years; or jail or house of correction not less than 18 months or not more than 2 1/2 years; no continuance with a finding, filing, or suspended sentence, probation, parole, furlough, or sentence deduction until 18 months served; item to be ordered forfeited.

SIGNATURE OF COMPLAINANT X	SWORN TO BEFORE CLERK-MAGISTRATE/ASST. CLERK/DEP. ASST. CLERK X	DATE
NAME OF COMPLAINANT	CLERK-MAGISTRATE/ ASST. CLERK A TRUE COPY ATTEST X	DATE

**Notice to Defendant:** 42 U.S.C. § 3796gg-4(e) requires this notice: If you are convicted of a misdemeanor crime of domestic violence you may be prohibited permanently from purchasing and/or possessing a firearm and/or ammunition pursuant to 18 U.S.C. § 922 (g) (9) and other applicable related Federal, State, or local laws.



<b>CRIMINAL COMPLAINT</b> PROSECUTOR COPY		DOCKET NUMBER <b>1333CR001792</b>	NO. OF COUNTS <b>1</b>	<b>Trial Court of Massachusetts District Court Department</b>
DEFENDANT NAME & ADDRESS <b>Mitchell T Violet 284 England Street Apt#2 New Bedford, MA 02745</b>				COURT NAME & ADDRESS <b>New Bedford District Court 75 North Sixth Street New Bedford, MA 02740 (508)999-9700</b>
DEFENDANT DOB <b>04/05/1988</b>	COMPLAINT ISSUED <b>03/27/2013</b>	DATE OF OFFENSE <b>03/18/2013</b>	ARREST DATE	
OFFENSE CITY / TOWN <b>Dartmouth</b>		OFFENSE ADDRESS		NEXT EVENT DATE & TIME <b>04/17/2013 8:00 AM</b>
POLICE DEPARTMENT <b>DARTMOUTH PD</b>		POLICE INCIDENT NUMBER <b>13-116-WA</b>		NEXT SCHEDULED EVENT <b>Arraignment</b>
OBTN				ROOM / SESSION <b>Arraignment Session</b>
<p>The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date(s) indicated below the defendant committed the offense(s) listed below and on any attached pages.</p>				

COUNT	CODE	DESCRIPTION
1	269/10/EE	FIREARM, CARRY WITHOUT LICENSE LOADED c269 s.10(n)

On 03/18/2013 did knowingly have in his or her possession, or under his or her control in a vehicle, a loaded firearm or a loaded rifle or shotgun, as defined in G.L. c.140. 121 or G.L. c.269, §10(n), not then being present in his or her residence or place of business, and not having in effect a license to carry firearms or otherwise being authorized by law to do so, in violation of G.L. c.269, §10(a) & (n).

(PENALTY for violation of §10(a): state prison not less than 2½ years, not more than 5 years; or jail or house of correction not less than 18 months, not more than 2½ years; no continuance without a finding, filing, or suspended sentence; no probation, parole, work release, furlough, or sentence deduction for good conduct until 18 months served; §10(e): firearm, rifle or shotgun to be ordered forfeited. PLUS additional sentence pursuant to §10(n): jail or house of correction not more than 2½ years from and after expiration of sentence for violation of §10(a).)

SIGNATURE OF COMPLAINANT <b>X</b>	SWORN TO BEFORE CLERK-MAGISTRATE/ASST. CLERK/DEP. ASST. CLERK <b>X</b>	DATE
NAME OF COMPLAINANT	CLERK-MAGISTRATE/ ASST. CLERK <b>X</b>	DATE

**Notice to Defendant:** 42 U.S.C. § 3796gg-4(e) requires this notice: If you are convicted of a misdemeanor crime of domestic violence you may be prohibited permanently from purchasing and/or possessing a firearm and/or ammunition pursuant to 18 U.S.C. § 922 (g) (9) and other applicable related Federal, State, or local laws.

# ADDENDUM

## ADDENDUM

Mass. General Laws, Chapter 266 § 30A

### **§ 30A. Shoplifting; Alteration of Price Tag; Theft of Shopping Cart.**

**Any person who intentionally takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise or converting the same to the use of such person without paying to the merchant the value thereof; or**

**any person who intentionally conceals upon his person or otherwise any merchandise offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of proceeds, use or benefit of such merchandise or converting the same to the use of such person without paying to the merchant the value thereof; or**

**any person who intentionally alters, transfers or removes any label, price tag or marking indicia of value or any other markings which aid in determining value affixed to any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment and to attempt to purchase such merchandise personally or in consort with another at less than the full retail value with the intention of depriving the merchant of all or some part of the retail value thereof; or**

**any person who intentionally transfers any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment from the container in or on which the same shall be displayed to any other container with intent to deprive the merchant of all or some part of the retail value thereof; or**

**any person who intentionally records a value for the merchandise which is less than the actual retail value with the intention of depriving the merchant of the full retail value thereof; or**

**any person who intentionally removes a shopping cart from the premises of a store or other retail mercantile establishment, without the consent of the merchant given at the time of such removal, with the intention of permanently depriving the merchant of the possession, use or benefit of such cart; and**

**where the retail value of the goods obtained is less than one hundred dollars, shall be punished for a first offense by a fine not to exceed two hundred and fifty dollars, for a second offense by a fine of not less than one hundred nor more than five hundred dollars and for a third or subsequent offense by a fine of not more than five hundred dollars or imprisonment in a jail for not more than two years, or by**

**both such fine and imprisonment. Where the retail value of the goods obtained equals or exceeds one hundred dollars, any violation of this section shall be punished by a fine of not more than one thousand dollars or by imprisonment in the house of correction for not more than two and one-half years, or by both such fine and imprisonment.**

**If the retail value of the goods obtained is less than one hundred dollars, this section shall apply to the exclusion of section thirty.**

**Law enforcement officers may arrest without warrant any person he has probable cause for believing has committed the offense of shoplifting as defined in this section. The statement of a merchant or his employee or agent that a person has violated a provision of this section shall constitute probable cause for arrest by any law enforcement officer authorized to make an arrest in such jurisdiction.**

**Mass. General Laws, Chapter 269 § 10(a)**

**10. Weapons -- Dangerous Weapons -- Unlawfully Carrying.**

**(a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:**

- (1) being present in or on his residence or place of business; or**
- (2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or**
- (3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or**
- (4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or**
- (5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:**

- (1) being present in or on his residence or place of business; or**
- (2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or**
- (3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or**

**(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or**

**(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or**

**(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.**

**No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.**

**The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.**

**The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.**